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7 BANK OF NEW YORK AS SUCCESSOR TRUSTEE TO JPMORGAN
CHASE BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR THE
8 CERTIFICATEHOLDERS OF STRUCTURED ASSET MORTGAGE
INVESTMENTS II INC. BEAR STEARNS ALT-A TRUST, MORTGAGE
9 PASS-THROUGH CERTIFICATES SERIES 2005-7

10 UNITED STATES BANKRUPTCY COURT

11 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

12 In re	Case No.09-71561
13 NICOLE CHRISTINA MCCONVILLE,	Chapter 7
14 Debtor(s).	R.S. No. CJR-602
	MOTION FOR RELIEF FROM AUTOMATIC STAY (11 U.S.C. § 362 and Bankruptcy Rule 4001)

17 DATE: March 5, 2010
18 TIME: 11:00am
CTRM: 201

19 20 1300 Clay Street, Suite 300
Oakland, CA 94604-1426

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22
23
24 The Bank of New York Mellon formerly known as The Bank of New York as successor
25 Trustee to JPMorgan Chase Bank, National Association as Trustee for the Certificateholders of
26 Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage Pass-
27 Through Certificates Series 2005-7 ("Movant"), moves this court for an order terminating the
28 automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all

1 acts necessary to enforce its security interest in real property generally described as 2523 Martin
2 Luther King Jr Way, Oakland, California 94612.

3 On or about December 2, 2009, Nicole Christina McConville ("Debtor") filed a
4 voluntary petition under Chapter 7 of the Bankruptcy Code, and Tevis Thompson was appointed
5 as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and
6 the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

7 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
8 362(d)(2).

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I.**

11 **MOVANT IS ENTITLED TO RELIEF FROM THE**
12 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

13 **NO EQUITY**

14 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
15 debtor does not have any equity in the property and the property is not necessary to the debtor's
16 effective reorganization.

17 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:

18 § 362(d)(2) reflects congressional intent to allow creditors to
immediately proceed against the property where the debtor has no
19 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1).
(Emphasis added).

20 Id. at 610 (emphasis added).

21
22 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
23 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
24 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
25 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
26 (9th Cir. 1984).

27 /./.

28 /./.

1 An appropriate cost of sale factor should also be added to determine if the debtor has
2 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.
3 283, 289 (Bankr. S.D. Cal. 1982).

4 On or about April 6, 2005, Debtor, for valuable consideration, made, executed and
5 delivered to Silver State Financial Services, dba Silver State Mortgage ("Lender") a Note in the
6 principal sum of \$415,500.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make
7 monthly principal and interest payments commencing June 1, 2005, and continuing until May 1,
8 2020, when all outstanding amounts are due and payable. The Note provides that, in the event
9 of default, the holder of the Note has the option of declaring all unpaid sums immediately due
10 and payable. A true and correct copy of the Note is attached to the Declaration in Support of
11 Motion for Relief From Automatic Stay as exhibit A and incorporated herein by reference.

12 On or about April 6, 2005, the Debtor made, executed and delivered to Lender a Deed of
13 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
14 described as 2523 Martin Luther King Jr Way, Oakland, California 94612 (the "Real
15 Property"), which is more fully described in the Deed of Trust. The Deed of Trust provides that
16 attorneys' fees and costs incurred as a result of the Debtor's bankruptcy case may be included in
17 the outstanding balance under the Note. The Deed of Trust was recorded on April 12, 2005, in
18 the Official Records of Alameda County, State of California. A true and correct copy of the
19 Deed of Trust is attached to the Declaration in Support of Motion for Relief From Automatic
20 Stay as exhibit B and incorporated herein by reference.

21 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and
22 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
23 evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in
24 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by
25 reference.

26 The obligation under the Note is in default as of September 1, 2008, for failure to make
27 payments to Movant. As of January 1, 2010, the total obligation due and owing under the Note
28 is in the approximate amount of \$447,732.07, representing the principal balance of

1 \$402,668.30, interest in the sum of \$39,553.78, late charges in the amount of \$1,712.85, escrow
2 advances in the amount of \$1,899.32, and a recoverable balance in the amount of \$1,897.82.
3 This is an approximate amount for purposes of this Motion only, and should not be relied upon
4 as such to pay off the subject loan as interest and additional advances may come due subsequent
5 to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's
6 counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in
7 bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate
8 sum of \$52,311.26, excluding the post-petition attorneys' fees and costs incurred in filing the
9 instant Motion. A true and correct copy of the contractual payment accounting pursuant to
10 Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From
11 Automatic Stay as exhibit D and incorporated herein by reference.

12 **II.**

13 **RELIEF FROM STAY**

14 **LACK OF EQUITY**

15 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
16 Statements, the fair market value of the Property is approximately \$350,000.00. True and
17 correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to
18 the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and
19 incorporated herein by reference.

20 Based on the above, Movant maintains that the equity in the Property is as follows:

21	Fair Market Value:	\$350,000.00
22	Less:	
	Movant's 1 st Trust Deed	\$447,732.07
23	Costs of Sale (8%)	\$28,000.00
	Equity in the Property:	\$<125,732.07>

24
25 As a result, there is little to no equity in the Property for the bankruptcy estate.
26 Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a
27 result, Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

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1 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real
2 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's
3 Statement of Intent is attached to the Declaration in Support of Motion for Relief From
4 Automatic Stay as exhibit F and incorporated herein by reference.

5 **III.**

6 **MOVANT IS ENTITLED TO RELIEF FROM THE**
7 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

8 **CAUSE - LACK OF ADEQUATE PROTECTION**

9 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to
10 adequate protection of its interest in the Property.

11 Movant submits that adequate protection in this case requires normal and periodic cash
12 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed
13 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

14 Movant is informed and believes that Debtor is presently unwilling or unable to provide
15 adequate protection to the Movant and there is no probability that adequate protection can be
16 afforded to Movant within a reasonable time.

17 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
18 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

19 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

20 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the
21 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
22 Trust;

23 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

24 3. Granting Movant leave to foreclose on the Real Property and to enforce the
25 security interest under the Note and the Deed of Trust, including any action necessary to obtain
26 possession of the Property;

27 /./.

28 /./.

4. Permitting Movant to offer and provide Debtor with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay when due (a) the monthly installments of principal and interest, as required under the Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the filing of this motion;

6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law; and

7. For such other and further relief as the court deems just and proper.

Dated: January 15, 2010

PITE DUNCAN, LLP

/s/ **CASPER J. RANKIN (CA SBN 249196)**
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